Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-1803–08 OF 2013 AND W-02(IM)(NCC)-1804–08 OF 2013

ZAHARAH IBRAHIM, DAVID WONG AND VARGHESE GEORGE JJCA

7 DECEMBER 2015

Companies and Corporations — Shares — Valuation — Respondent obtained order against second appellant to buy-out appellant's shareholding in first respondent pursuant to petition under s 181 of the Companies Act 1965 — Valuer appointed based on order — Appellant dissatisfied with valuer's report and applied to make representations on valuation report by way of cross-examination of valuation experts — Respondent applied for court to determine final value of shareholding based on valuer's report — Whether within ambit of order to allow additional representation — Whether within scope of order for court to consider that premium should be added-on to valuation of shares — Companies Act 1965 s 181

The appellant had obtained an order ('the order') pursuant to a petition under s 181 of the Companies Act 1965 ('the Act') that the second respondent was to buy-out the appellant's 30% shareholding in the first respondent company. Pursuant to the order, Ferrier Hodgson MH Sdn Bhd ('FHMH') was appointed as the joint valuer for appellant's shareholdings. Based on the final valuation report ('FVR') issued by FHMH, the appellant's shares on a 'net tangible assets' was valued at RM35.97m. Aggrieved with the FVR, the appellant filed encl 80 and sought to make representations on the FVR by way of cross-examination of the valuation experts. In response, the second respondent filed encl 84 for the High Court to determine the final value based on the FVR and for consequential orders to give effect to the purchase of the shares. The High Court dismissed encl 80 and allowed encl 84, hence the present appeals. The primary issue for determination was whether it was within the ambit of the order to allow additional 'representation' to be made or for further evidence to be adduced in court on the question of the value of the shares as duly assessed by FHMH and set out in the FVR. There was also a subsidiary issue for court's consideration ie whether the terms of the order provided for within its scope any further consideration by the court of argument at this stage that a 'premium' should be added-on to the NTA valuation made in the FVR, that was before the court fixed the final value of the appellant's 30% shareholding in the order.

Held, dismissing the appeals with costs:

(1) What was being sought by the appellant vide encl 80 was to have a 'second bite at the cherry', to nullify the whole valuation exercise of the shares which had been duly completed by FHMH, after having considered representations made by both the appellant and the second respondent. To now further allow a repeat of that process would amount to the court being labored with further experts and evidence and this was both illogical and counterproductive. From a fundamental foundational perspective there was therefore no merit in the appellant's application. In addition, by providing in the order that representations of the parties pertaining to the valuation exercise were to be directed to the valuer, the court was precluding expressly any further representation on value to be made to the court (see paras 24–25).

(2) The term '… and the parties may apply' in order (iv) did not mean that either of the parties was entitled as a matter of right to adduce further evidence so as to, in effect, reopen the valuation for the shares arrived at in the FVR. The term should be construed within the limited context of that order that the valuer had to file the completed valuation in court. The catch-all 'liberty to apply' under order (x) was also of no assistance to appellant as the scope of application under this general liberty was for the parties to seek further assistance as to carrying out of the order should there be any hiccup encountered somewhere in that process (see paras 31–33).

(3) The order was issued at the conclusion of the petition under s 181 of the Act. It could not have been within the intention of the judge to allow any further consideration which would increase the valuation for the shares, for if it was to be so His Lordship would had decreed accordingly in that order itself. A consideration of such a substantive matter ie the court in fixing the purchase price of the appellant's shares should factor in a 'premium' to the NTA valuation in the FVR, should had been pursued at the trial stage but there was no such evidence in present case (see paras 36–37).

(4) The processes laid out had been complied with in this case, hence, encl 84 was what was rightfully envisaged within the ambit of order (v) of the order, that was, for further directions of court once the valuation exercise as ordered by the court was completed. The learned judge was therefore correct in allowing encl 84 (see paras 38–39).

[Bahasa Malaysia summary

Perayu telah memperoleh perintah ('perintah tersebut') berikutan petisyen di bawah s 181 Akta Syarikat 1965 ('Akta tersebut') bahawa responden kedua adalah untuk membeli pegangan saham 30% perayu dalam syarikat responden pertama. Berikutan perintah itu, Ferrier Hodgson MH Sdn Bhd ('FHMH')

telah dilantik sebagai penilai bersama untuk pegangan saham perayu. Berdasarkan laporan penilaian akhir ('LPA') yang dikeluarkan oleh FHMH, saham perayu untuk 'net tangible assets' dinilaikan pada RM35.97 juta. Terkilan dengan LPA itu, perayu telah memfailkan lampiran 80 dan memohon untuk membuat representasi berhubung LPA itu melalui pemeriksaan balas pakar-pakar penilaian itu. Dalam menjawab, responden kedua telah memfailkan lampiran 84 untuk Mahkamah Tinggi menentukan nilai akhir berdasarkan LPA dan untuk perintah berbangkit untuk melaksanakan belian saham itu. Mahkamah Tinggi telah menolak lampiran 80 dan membenarkan lampiran 84, justeru rayuan-rayuan ini. Isu utama untuk ditentukan adalah sama ada ia adalah dalam skop perintah itu bagi membenarkan 'representation' tambahan dibuat atau untuk keterangan selanjutnya dikemukakan dalam mahkamah berhubung persoalan tentang nilai saham sepertimana ditaksirkan oleh FHMH dan dinyatakan dalam LPA. Terdapat juga isu subsidiari untuk pertimbangan mahkamah iaitu sama ada terma-terma perintah tersebut yang diperuntukkan dalam skopnya apa-apa pertimbangan selanjutnya oleh mahkamah tentang hujah di peringkat ini bahawa suatu 'permium' patut ditambah kepada penilaian NTA yang dibuat dalam LPA tersebut, iaitu sebelum mahkamah menetapkan nilai akhir pegangan saham 30% perayu dalam perintah tersebut.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Apa yang dipohon oleh perayu melalui lampiran 80 adalah untuk mendapat 'second bite at the cherry', untuk membatalkan keseluruhan amalan penilaian saham itu yang telahpun disiapkan oleh FHMH, setelah mempertimbangkan representasi-representasi yang dibuat oleh kedua-dua perayu dan responden kedua. Jika kini ingin selanjutnya membenarkan ulangan proses tersebut akan menyebabkan mahkamah dibebani dengan pakar dan keterangan selanjutnya dan ini tidak logikal dan tidak produktif. Berdasarkan persepsi asas yang penting maka tiada merit dalam permohonan perayu. Tambahan, dengan memperuntukkan dalam perintah tersebut bahawa representasi-representasi pihak-pihak berkaitan amalan penilaian hendaklah diarahkan kepada penilai, mahkamah dengan nyata mengecualikan apa-apa representasi selanjutnya berhubung nilai yang perlu dibuat kepada mahkamah (lihat perenggan 24–25).

(2) Terma '... and the parties may apply' dalam perintah (iv) tidak bermaksud bahawa mana-mana pihak tersebut berhak sebagai suatu perkara yang betul untuk mengemukakan keterangan selanjutnya dalam, melaksanakan, membuka semua penilaian untuk saham yang dibuat dalam LPA itu. Terma yang patut ditafsirkan dalam konteks terhad perintah tersebut bahawa penilai perlu memfailkan penilaian yang lengkap di mahkamah. Kesemua 'liberty to apply' di bawah perintah (x) juga tidak membantu kepada perayu kerana skop permohonan di bawah

kebebasan am ini adalah untuk pihak-pihak memohon bantuan selanjutnya dalam pelaksanaan perintah itu jika terdapat apa-apa kekangan yang timbul dalam proses tersebut (lihat perenggan 31–33).

(3) Perintah itu telah dikeluarkan semasa kesimpulan petisyen itu di bawah s 181 Akta tersebut. Ia tidak mungkin niat hakim untuk membenarkan apa-apa pertimbangan selanjutnya yang akan meningkatkan nilai bagi saham tersebut, kerana jika ia sedemikian maka Yang Arif akan menetapkan sewajarnya dalam perintah itu sendiri. Suatu pertimbangan berhubung perkara substantif sebegini iaitu mahkamah menetapkan harga belian saham perayu hendaklah mengambil kira 'premium' kepada penilaian NTA dalam LPA tersebut, hendaklah dimulakan di peringkat perbicaraan tetapi tiada keterangan sebegini dalam kes ini (lihat perenggan 36–37).

(4) Proses-proses yang dinyatakan telah dipatuhi dalam kes ini, justeru, lampiran 84 adalah apa yang sewajarnya dihasratkan dalam skop perintah (v) perintah tersebut, iaitu, untuk arahan mahkamah selanjutnya selepas amalan penilaian sepertimana diperintahkan oleh mahkamah selesai. Hakim yang arif dengan itu adalah wajar dalam membenarkan lampiran 84 (lihat perenggan 38–39).]

Notes

For cases on valuation, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1210–1218.

Cases referred to

Campbell v Edwards [1976] 1 WLR 403, CA (refd)
Collier v Mason (1858) 53 ER 613 (refd)
Cristel v Cristel [1951] 2 All ER 574, CA (refd)
Folin & Brothers Sdn Bhd (in liquidation) & Ors v Folin Food Processing Sdn Bhd & Ors [2011] 6 MLJ 585; [2011] 8 CLJ 141, CA (refd)
Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2009] MLJU 339; [2009] 1 LNS 1202, CA (refd)
Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title No 1256 [2007] 1 SLR 1004, HC (refd)
Kanawagi s/o Seperumaniam v Penang Port Commission [2001] 5 MLJ 433, HC (refd)
Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd & Ors [1975] 1 MLJ 134, FC (refd)
Leong Ah Weng v Neoh Thean Soo & Anor [1983] 2 MLJ 119, FC (refd)
Nicholson v Nicholson ALR Vol 4 1997 p 212 (refd)
Public Bank Bhd v Chan Tak Kow [1988] 3 MLJ 330, HC (refd)

Legislation referred to

Companies Act 1965 s 181

Appeal from: Petition No 26NCC-42 of 2011 (High Court, Kuala Lumpur)

K Kirubakaran (Mark Ho and Jananee Gopal with him) (Chellam & Wong) for the appellant.
John Skelchy (Vishal Kumar with him) (James Monteiro) for the first respondent.
Cyrus Das (Malik Imtiaz Sarwar, Yoong Nim Chor and Pavendeep Singh) (Yoong & Partners) for the second and third respondents.

Varghese George JCA:

INTRODUCTION

[1] There were two appeals by the same appellant before us. They were appeals:

(a) against the dismissal by the High Court of the appellant's encl 80 application; and

(b) against the orders granted by the High Court pursuant to the second respondent's encl 84 application.

[2] The High Court had heard both the applications together and issued one decision. Before us, the appeals were also heard together on 19 February 2014. We had on the same day dismissed the said appeals and affirmed the decision of the High Court.

BACKGROUND

[3] The two applications before the High Court was consequential to and flowed from an earlier order of Abdul Aziz J (as he then was) made on 27 March 2012 in this petition brought under s 181 of the Companies Act 1965. The appellant was the petitioner and held a 30% shareholding in the first respondent.

[4] The petition was premised upon allegations by the appellant of minority oppression in the affairs and management of the first respondent. The High Court's order of 27 March 2012 disposing the petition ordered that there be a buy-out of the appellant's shares in the first respondent by the second respondent. The orders made after a full hearing were as follows:

(i) That the 2nd Respondent shall buy-out all the 4,500,000 shares of the Petitioner in the 1st Respondent, at the price of those shares to be

determined by an independent valuer on a 'net tangible asset' basis, such valuation to be as at the date of this Order.

(ii) That the appointment of the independent valuer is to be mutually agreed by the Petitioner and the 2nd Respondent and in the event those parties cannot agree to the independent valuer, either of those parties are at liberty to apply to Court to appoint a valuer.

(iii) That the valuation is to be done within three (3) months from the date of this Order and the parties may make representations to the valuer as to the valuation.

(iv) That the valuer shall file the valuation report into Court and the parties may apply.

(v) That the Court will determine the final value of the shares and the terms of the buy-out order.

(vi) That the costs of the valuation shall be borne and paid by the 1st Respondent.

(vii) That should the 2nd Respondent be unable to proceed with the buy-out the Petitioner shall be at liberty to apply.

(viii) That the costs of this Petition of RM50,000.00 which includes all previous orders for costs in the cause, shall be paid by the 2nd and 3rd Respondents to the Petitioner.

(ix) No order as to costs against the 1st Respondent.

(x) That parties shall be at liberty to apply.

[5] Pursuant to order (ii) above the parties by mutual agreement appointed Messrs Ferrier Hodgson MH Sdn Bhd ('FHMH') as the independent valuer to determine the price of the subject shares. After several extensions of time agreed to by the court and the parties, FHMH produced a draft valuation report dated 16 November 2012 which was circulated to the parties for their comments. Representations were made thereto by the parties and FHMH then proceeded to issue the final valuation report ('FVR') on 31 December 2012 wherein the appellant's shares on a 'net tangible assets' basis ('NTA') (of the first respondent) was valued at RM35.97m.

Enclosure 80

[6] The appellant's encl 80 application (which was dismissed) had sought for the following orders to be made by the court:

(i) Representations be made on the Valuation Report dated 31.12.2012 prepared by Messrs. Ferrier Hodgson MH Sdn. Bhd., in such manner that this honorable court shall deem fit, in particular and including any directions on the filing of affidavits, the attendance of experts at court to give testimony, and the cross examination of the said experts;

(ii) Costs and disbursements of the appointment of such experts and their attendance in court including all incidentals, to be borne and paid by the 1st Respondent;

(iii) Costs of this application, and

(iv) Further or other orders or directions that this honourable court shall deem fit.

Enclosure 84

[7] On the other hand vide encl 84, the second respondent being satisfied with the FVR, had applied for the following orders:

(1) That, pursuant to order no. (v) of the Order dated 27 March 2012, the Court determines the final value, being the price of the 4,500,000 shares of the Petitioner in the 1st Respondent, and the 2nd Respondent shall buy and the Petitioner shall sell such shares at the price so determined.

(2) That the Court makes such ancillary terms of such buy-out of such shares by the 2nd Respondent from the Petitioner as the Court deems fit.

(3) That the costs of this application be borne by the Petitioner or as may otherwise be determined by the Court.

(4) Such other and further relief or Order as this Honourable Court deems to be fair and appropriate.

DECISION OF THE HIGH COURT

[8] The following extracts from the grounds of decision of the learned judge capture the essential basis upon which the court proceeded to dismiss the appellant's encl 80, whilst allowing the respondent's encl 84:

> 4. From the terms of the applications and their related affidavits, it would appear that the Petitioner is not saying for a moment that the 2nd Respondent's application is misplaced. After all, the buyout was the principal order of the Court. What it in essence is saying is that before that order on the final value of the shares and the terms of the buyout is made, it wants an opportunity to make representations and call experts on the report and its contents. According to the Petitioner, it ought to be allowed to make representations for various reasons which I shall summarize as follow.
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> ...
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> 10. In opposition, the crux of the 2nd Respondent's submissions is that the Petitioner's application was not about making representations. It was really an attempt by the Petitioner to impugn that single valuation report prepared by a mutually agreed valuer. This was entirely outside the terms of the order of Court made on 27.3.2012.
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> ...

12. Having examined all these matters, the 2nd Respondent submitted that the report before the Court was fair, considered, balanced and had taken into account all presentations and representations of the parties. The parties, especially the Petitioner had been given all latitude and there was no need for any verification to be conducted by this Court. Further, it was submitted that it had not been shown how FHMH had 'got it wrong' whether in methodology, evidence or in any other regard.

...

18. In this case, the Petitioner claimed to be making representations. However, in articulating its various those [sic] representations or reasons, it is quite apparent that the Petitioner is in fact challenging the valuer and the valuation. This is quite outside the ambit of the order and as pointed out, not even condoned by the Court of Appeal in *Genisys Integrated Engineers v UEM Genisys Sdn Bhd & 3 Ors* [Court of Appeal Civil Appeal No. W-02–1158–2005 (No 3)].

19. More significantly and of importance is the fact that the matters now raised by the Petitioner have already been raised before FHMH. As evidenced from the valuation report, FHMH have duly taken account of those matters or representations of the Petitioner. A perusal of the report readily confirms that FHMH had inter alia taken into account the 'written representations' of the Petitioner and the 2nd Respondent as its 'sources of information' which it had then 'used to form our opinion on the fair valuation' [see paragraph 1.3 at pages 8 and 9 of the report].

20. In fact, when the Petitioner's concerns today are put into its proper perspective, it appears that the Petitioner is not suggesting that its representations have been disregarded. Rather, it suggests that there are 'no clear justifications' for FHMH to have come to the conclusions and valuation that it did. This is quite different from making representations; and certainly an entirely different exercise from that allowed under the terms of the order of 27.3.2012. This is clearly a challenge of the valuation.

...

22. Before embarking on the actual valuation, FHMH acquainted itself with background information and the financial position of the 1st Respondent. Such information included familiarizing itself with the relevant joint development agreement and court actions. As for the valuation itself, FHMH's approach, as directed by the Court, used the NTA approach. This is extremely critical as this was the specific order of Court.

...

24. In ascertaining the market value of the land, it cannot be denied that FHMH considered both valuations by Henry Butcher and Hartanah [see paragraphs 4.1.1. and 4.1.2; and pages 25 to 32] ...

25. In the report, FHMH recognized that there was a subsequent event of a Supplemental Joint Development Agreement made on 3.7.2012; but this was disregarded. FHMH gave its reasons – because the order of Court directed the valuation to be as at 27.3.2012.

...

27. The Petitioner has further suggested that a premium must be added to the value ascertained by FHMH. This is because the transaction is not at arm's length between a willing buyer and a willing seller. This transaction or buyout was born out of an oppression Petition where in order to do justice the Court ordered a buyout. According to the Petitioner, justice surely cannot be on the value of the shares alone but a premium imposed to reflect the Court's disdain for the act of oppression on the minority

...

31. On this aspect, the 2nd Respondent argued that given there was no appeal against the order of the Court made on 27.3.2012, this proposition of adding a premium to the price of the shares to reflect the oppression ought to be disregarded. If at all this proposition was to be considered, is should have been raised at the outset.

32. Again, I must agree. If there is any argument to be made for such imposition or enhancement, it ought to have been made at the time when the Petition was heard, and when addressing the reliefs sought. As the terms of the order did not extend to affixing this premium for this purpose, be it in the form of interest or any other component, this additional term is refused. In any case, I do not find the circumstances of this case (as explained and urged by the Petitioner) such as to fall into this category of 'extremely limited cases' where a premium is warranted.

...

35. Following from the above, the application in enclosure 80 is therefore dismissed with no order as to costs. As for enclosure 84, having further heard parties and having taken into consideration further agreed terms, accordingly, it is ordered that:

i. with regard the final price of the shares using the NTA approach as at 27.3.2012, it shall be fixed at RM7.99 per share with the aggregate purchase price of RM35.97 million;

ii. this buy-out shall be completed within four months from the date of this order on a business day in Kuala Lumpur and at an office address in Kuala Lumpur as notified with at least 7 days' prior written notice by the 2nd Respondent (or its solicitors) to the Petitioner (or its solicitors);

iii. the buy-out shall be completed by paying RM35.97 million to the Petitioner by way of a bankers' draft and the Petitioner shall deliver to the 2nd Respondent a duly executed valid and proper instrument of transfer for the 30% shares together with the corresponding share certificates for the 30% shares as well as such other executed documents as may be necessary for revenue and stamp duty purposes; and

iv. the Petitioner procures that Mr Yeoh Keng Tat resigns as a director of the 1st Respondent, such resignation to be effective on or before the date of completion of the purchase of the 30% shares.

SUBMISSIONS OF THE APPELLANT — SUMMARY

[9] The thrust of the appellant's submission was that the order of court of 27 March 2012 did not preclude the parties involved of coming to court to 'challenge' the FVR if either of them was not happy with the reported valuation of the price for the subject shares. Emphasis was in this respect placed on the terms '*... and the parties may apply*' and '*liberty to apply*' found in order (iv) and (x) respectively of the order of court of 27 March 2012. It was argued that the court was never intended to be a mere 'rubber-stamp' once the valuation exercise was completed and it was still open to concerned parties to make 'representations' to the court on the valuation exercise undertaken and/or the valuation arrived at by the valuer.

[10] It was contended for the appellant too, that in this case FHMH had failed to adopt or give sufficient regard to the valuation done by Hartanah Consultants (Valuation) Sdn Bhd ('Hartanah') which had been submitted by the appellants to substantiate a higher gross development value ('GDV') in respect of the land belonging to the first respondent. It was further pointed out that the land valuation undertaken by Henry Butcher Malaysia Sdn Bhd ('Henry Butcher') (relied upon by FHMH) and the derived GDV (RM2.5m) based on the joint development agreement of 16 March 2010, had ignored a subsequent announcement pertaining to GDV of the land that had been made by or for the first respondent.

[11] It was also canvassed for the appellant that the final price to be fixed by the court for the shares should include a 'premium' element in addition to the assessed NTA valuation, since the disposition of the shares by the appellant was not on a 'willing seller-willing buyer' basis but on a forced 'buy-out' basis; the court, it was urged, was entitled to do so to reflect the fair value of the shares in the market and/or the court's disdain for the oppression occasioned to the appellant.

SUBMISSION OF THE SECOND RESPONDENT — IN SUMMARY

[12] Counsel for the second respondent submitted that the objective underlying the appellant's application was purely to impugn the valuation arrived at as stated in the FVR, and if allowed this would in effect draw the court into undertaking a 'revaluation' exercise to fix a share-price in variance to that assessed by FHMH. This, it was submitted, would not accord with the terms of the order of court of 27 March 2012 which had entrusted such assessment to be made by an independent single-expert valuer agreed to by the parties and whose finding was to be binding, unless of course, there was obvious evidence of blatant fraud or collusion in that exercise or conclusion reached.

[13] It was contended that the term '... the parties may apply' provided in order (iv) of the order of court of 27 March 2012 had to be restrictively construed to allow the parties to be heard further only in respect of the working out of the details for the implementation of the transfer of the appellant's 30% shareholding to the second respondent (and incidentals thereto) consequent to the price for the shares being determined by the independent valuer and confirmed by the court (see order (v) following). It was argued that accordingly it did not provide for a situation where the very valuation exercise entrusted to an independent valuer by the court could be reopened for scrutiny or further assessment at the instance of any unsatisfied party. There was no exceptional circumstance shown in this case in any event for the court to depart from that valuation already fixed by FHMH.

[14] Further, it was highlighted to us that in this case, the appellant had the opportunity as a matter of fact to make and had made their representations on the draft valuation report prepared by FHMH and extended to the parties for their comments. FHMH had in turn taken into consideration the inputs of the appellant and had even made an upward revision in respect of the originally proposed valuation for the 30% shareholding held by the appellant from RM33.78m to RM35.97m in the FVR submitted to court. The valuation as per the FVR was in any event a reasoned, structured and fair one in all the circumstances of the matter and this had been accordingly accepted by the learned judge.

[15] It was also submitted that the order of court of 27 March 2012 did not provide that there ought to be a consideration of a further sum by way of 'premium' to the NTA value assessed, nor that the parties were entitled to submit further thereon or on any other similar issue, when the value for the shares were subsequently confirmed and the terms of the buy-out were issued by the court pursuant to order (v) thereto. The value for the shares was expressly restricted to be derived on the basis of the NTA valuation of the first respondent. The order of court of 27 March 2012, it was reiterated, was a final one made by the judge who had heard the parties and considered all submissions in respect of the oppression petition; the question of an additional 'premium' over and above the value for the shares on the ordered NTA basis, and only brought up now by the Appellant, was therefore a non-issue.

OUR DELIBERATION AND DECISION

[16] In our assessment there were only two issues before us. The *primary issue* was whether it was within the ambit of the terms as ordered by the court on 27 March 2012 to allow additional 'representations' to be made or for further evidence to be adduced in court (by way of affidavit or by examination/cross-examination of other experts) on the question of the value

of the shares as duly assessed by FHMH and set out in the FVR. The *subsidiary issue* was whether the terms of that same order provided for within its scope any further consideration by the court of argument at this stage that a 'premium' should be added-on to the NTA valuation made in the FVR, that is before the court fixed the final value of the appellant's 30% shareholding in the buy-out ordered.

[17] Paramount in our consideration was the fact that the order of court of 27 March 2012 was in the nature of a 'final judgment' disposing off conclusively the rather contentious petition. There was no cause for any doubt in our mind that the orders made on that day were intended by Abdul Aziz J to bring a closure to the dispute between the parties, save only for a process for the determination of the value of the appellant's shares to be taken over by the second respondent. Upon closer analysis, it would be appreciated that order (i) of the order of court of 27 March 2012 was in effect, the judgment of the court in the matter, that is, after the parties had been fully heard.

[18] It was also pertinent to note here that there was no appeal by either of the concerned parties against that judgment or in regard to the other consequential orders made therein, nor was there any clarification or variation sought of Abdul Aziz J as to the purport or extent of those terms.

[19] The scheme laid out for the valuation exercise ordered by the court to arrive at the price of the appellant's shares for purposes of the buy-out by the second respondent, was specifically enumerated in orders (ii)–(iv). It followed therefore that these consequential or ancillary orders, as they were, were principally intended to assist the court to fix a final value for the shares in question. This specific context of those consequential orders had to be borne in mind in the forefront of any determination of the issues now called into the questions in the encl 80 and encl 84 applications of the respective parties.

[20] It was envisaged in those ancillary orders that firstly the parties were to appoint a mutually agreed independent valuer. This had been effected (without recourse to the court, it must be noted). The significance of this, in our view, was that the parties were satisfied as to the credentials and independence of that single expert-valuer, thus explicitly agreeing to be bound by the result of the valuation that was to be undertaken by FHMH in this case.

[21] The rest of the matters within the order of court of 27 March 2012 that were material for our consideration were the following:

(a) '(iii) That the valuation is to be done within three (3) months from the date of this order *and the parties may make representation to the valuer as to the valuation*';

(b) '(iv) That the valuer shall file the valuation report into court *and the parties may apply*';

(c) '(v) That the court will determine the *final value of the shares and the terms of the buy-out order*';

and the 'omnibus' general provision:

(d) '(x) That the *parties shall be at liberty to apply*.'

[22] What need to be highlighted was that it was expressly provided in order (iii) that the *parties were to make 'representation' to the valuer* in respect of the valuation being undertaken at the behest of the court. The appellant was not denied this basic right, and as observed earlier, the appellant had indeed availed of this opportunity by submitting Hartanah's valuation report to this end. What was also not in dispute was that there had been an upward revision by FHMH in the FVR of the value for the subject shares when contrasted with the value that had been originally proposed in the draft valuation report circulated to the parties for their feedback.

[23] It was also evident from paras 5.0 and 6.0 of the FVR that FHMH had considered both the valuation by Henry Butcher and Hartanah in respect of the value of the land. FHMH was however of the view that Hartanah's postulated GDV was 'optimistic'; FHMH had nevertheless adopted a mid-point valuation from a possible range to reflect the GDV as at the cut-off date (27 March 2012) having factored-in a fair increment (for elapsed time) to the land value and to the original GDV as stated in the joint development agreement (17 March 2010). It could not be gainsaid that the valuation arrived at by FHMH was indeed a reasoned one.

[24] Obviously, what was therefore being sought by the appellant by way of encl 80 was to have a 'second bite at the cherry', to nullify the whole valuation exercise of the shares which had been duly completed by FHMH, after having considered representations made by both the appellant and the second respondent. The court had spelt out the modalities and had entrusted that specific task of valuation to the agreed independent valuer. To now further allow a repeat of that process would amount to the court being laboured with further experts and evidence and this was both illogical and counterproductive. From a fundamental foundational perspective there was therefore no merits in the appellant's application.

[25] Additionally in our view there was no room in the terms of the orders (iii), (iv) or (v) in the order of the court of 27 March 2012 for any such further 'representations' or other expert evidence to be allowed in court to 'challenge' or to seek a re-evaluation by the court of the value of the shares once a report of the appointed valuer was filed in court. By providing that representations of the

parties pertaining to the valuation exercise were to be directed to the valuer, the court was precluding expressly any further representation on value to be made to the court. If it was to be otherwise, the court would have incorporated express terms to the effect reserving to the parties yet the further right to make submissions or adduce further material, once the valuation had been submitted to the court.

[26] As observed by us earlier the specialist valuation exercise undertaken by the agreed independent valuer was intended to assist the court to fix a value to be paid by the second respondent for the shares. In our assessment it could not have been within the contemplation of the court therefore to keep this issue still open and invite upon the court further strain on the court's time and resources to revisit the valuation arrived at by the expert or referee solely appointed for that purpose.

[27] It must be stated that the mechanics for the determination of a conclusive value (either for land or shares) by a single expert, either appointed by the court or agreed to by the parties, was not uncommon in a judicial order (*Folin & Brothers Sdn Bhd (in liquidation) & Ors v Folin Food Processing Sdn Bhd & Ors* [2011] 6 MLJ 585; [2011] 8 CLJ 141 (CA); *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2009] MLJU 339; [2009] 1 LNS 1202 (CA)). In *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd & Ors* [1975] 1 MLJ 134, the Federal Court ruled that a valuation entrusted to independent valuer/expert, in similar circumstances as in this instant case, could only be impeached for fraud, or for miscarriage of justice such as where the valuer had taken into account something which he ought not to have considered or where the valuer had misinterpreted an underlying agreement or acted on some wholly erroneous principle; the valuation should not be disturbed otherwise and the court should refuse to act even if the price were excessive or small but was explainable (see also *Collier v Mason* (1858) 53 ER 613 referred by the Federal Court in that decision).

[28] An expert's decision could only be set aside on the basis of fraud or partiality or if there was any breach of the expert's appointment or if he had acted outside his mandate or remit (*Campbell v Edwards* [1976] 1 WLR 403; *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title No 1256* [2007] 1 SLR 1004). Basically the issue was one centred in contract, namely, where the parties had agreed on a common valuer or were bound to the valuation of an agreed single expert, here by the terms of the order of 27 March 2012. So long as the valuation was given honestly and in good faith the parties were bound to it, even if the expert had made a mistake.

[29] Now then would the terms '... and the parties may apply' included in order (iv) of the order of court of 27 March 2012 change that position. There

was no dearth of authority that have upheld the position in law that 'liberty to apply' and terms of similar nature or tenor, incorporated in a court order, prima facie referred to the right of parties to seek out further directions as to the working out of the actual terms of the order. In *Public Bank Bhd v Chan Tak Kow* [1988] 3 MLJ 330 Lamin J (as he then was) noted:

> it should be confined to the problem relating to enforcing or executing the order such as, for example, if there is some difficulty in its enforcement because of the terms of the order later found to be unclear or doubtful when faced with the actual situation on the ground, the party which obtained the order may approach the court again for its indulgence to seek clarification.

The court there agreed with Somervell LJ in *Cristel v Cristel* [1951] 2 All ER 574 that to allow the expression to mean that 'leave was reserved to both parties to make any application concerning any part of the order at any subsequent time' was too wide a statement and it had to be restricted 'to the working out of the actual terms of the order itself'.

[30] The meaning to be accorded to 'liberty to apply' has been eloquently defined by Jenky J in the case of *Nicholson v Nicholson* ALR Vol 4 1997 p 212 at p 216 in the following terms:

> 'Liberty to apply' is simply a device by which further orders may be made when necessary for the purposes of implementing and giving effect to the principal relief already pronounced'.

(quoted in *Kanawagi s/o Seperumaniam v Penang Port Commission* [2001] 5 MLJ 433 at p 468).

[31] We were therefore in agreement with the learned judge that the term '... and the parties may apply' in order (iv) did not mean that the either of the parties was entitled as a matter of right to adduce further evidence so as to, in effect, re-open the valuation for the shares arrived at in the FVR. Those words did not extend to allow a substantive attack on the valuation itself completed by a valuer agreed to by the parties. The court was obliged, unless there were compelling reasons as identified above, to sustain the integrity of the valuation done for the court.

[32] The terms '... and the parties may apply' in the said order (iv) had necessarily to be construed within the limited context of that order where the specific direction or requirement of the court was that the valuer had to file the completed valuation in court. Parties were, in our view, restricted as such to any application, for example, where the valuer had inordinately delayed or was otherwise refusing to complete the valuation after the parties had submitted their representations; the underlying purpose being to remedy any impasse encountered in the carrying out of the scheme for completing and implementing the principal judgment of the court.

[33] The catch-all 'liberty to apply' provided for in order (x) was of no assistance either to the appellant who was here seeking a reevaluation of the price stated in the FVR submitted by FHMH to the court. The scope of any application under this general liberty reserved to the parties was to seek further assistance or directions as to the carrying out of the overall terms of the judgment of court of 27 March 2012 for the buy-out of the appellant's shares should there be any hiccup encountered somewhere in that process. It is pertinent to note here that as per Abdoolcader FJ in *Leong Ah Weng v Neoh Thean Soo & Anor* [1983] 2 MLJ 119:

> ... all orders of court carry with them in gremio liberty to apply to court...as this is implied without it being expressly reserved ...

[34] We turn now to the subsidiary issue whether, the order (v) ('... the court will determine the final value of the shares and the terms of the buy-out') read by itself, or together with order (x) ('... the parties be at liberty to apply'), entitled the appellant to raise further submissions for the consideration of the court that the final value for the shares should also incorporate an additional 'premium' sum to reflect, as is contended now, the forced buy-out scenario and/or the court's disdain for the oppression suffered by the appellant.

[35] As alluded to earlier by us, the order of court of 27 March 2012 was for all intents and purposes a 'final judgment' save for such mechanism or process to fix the value of the shares. By the terms of order (i) the value of the shares in the buy-out ordered was expressly to be derived on an *NTA basis* of the first respondent. If there was to be some further element to be considered or taken into account once the NTA valuation had been determined, the court would surely have provided for this expressly as a further specific order or in terms of liberty to the parties to address the court for any 'premium' to be additionally factored in, before the court fixed the final value.

[36] The order of court of 27 March 2012 was issued at the conclusion of a trial of a s 181 petition. It could not have been within the intention of Abdul Aziz J to allow any further consideration which would increase the valuation for the shares (ordered to be on the NTA basis of the first respondent), for if it was to be so His Lordship would have decreed accordingly in that order itself. Such a further consideration was not a mere 'consequential' matter or issue but one which would have serious impact on the price to be paid for the shares in question by the second respondent. It need be highlighted again that the appellant did not appeal against the decision of the court of the 27 March 2012, which should have been done if it was dissatisfied with the terms of that judgment.

[37] We were therefore in agreement with the learned judge, who dismissed the encl 80 application of the appellant, that there was no valid basis

whatsoever to entertain at this stage the appellant's further contention that the court when fixing the purchase price for the shares to be paid by the second respondent to the appellant, should factor in as well a 'premium' to the NTA valuation in the FVR. A consideration of such a substantive matter (which would have marked impact on the final purchase price to be paid) should have been pursued at the trial stage and there was no evidence produced that this position had being canvassed at all by the appellant there; even if it was raised and the court had rejected the same, the appellant's recourse lay in an appeal and not as is sought now to vary the decision of the court of 27 March 2012 in hindsight.

[38] In our reading, order (v) in its context within the order of court of 27 March 2012, only meant that the court reserved its right to put its formal seal to the value of the shares, that is, after the court had been satisfied that the value for the shares in question had been determined as per the terms of order (i) and in compliance with the steps outlined in the further orders (ii)–(iv). The processes laid out had been duly complied with in this case and all that remained was for the court to confirm the price for the divestment of the appellant's shareholding in the first respondent and give any further directions to implement the buy-out ordered.

[39] In our view, encl 84 of the second respondent was what was rightfully envisaged within the ambit of order (v) of the order of court of 27 March 2012, that is, for further directions of court once the valuation exercise as ordered by the court was completed. The learned judge was correct therefore in allowing encl 84 and in making the needful orders to effectuate and complete the transfer of the appellant's shares in first respondent to the second respondent, the mechanics for payment of the value for the shares and to bring generally closure to the appellant's interest in and representation on the board of the first respondent, once the price for the shares had been paid.

CONCLUSION

[40] We therefore found no error committed by the learned judge in dismissing encl 80 of the appellant, whilst allowing encl 84 of the second respondent on 18 July 2013, against which these appeals had been brought. There were no merits in both the appeals. For the reasons discussed and elaborated above we unanimously dismissed the appeals with costs to be paid by the appellant to the second respondent.

Appeals dismissed with costs.

Reported by Dzulqarnain Ab Fatar